APPENDIX A—MEMORANDUM DECISION AND ORDER OF THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June, one thousand nine hundred and eighty-two.

PRESENT: Hon. Irving R. Kaufman, Hon. Ralph K. Winter, *Circuit Judges.* Hon. Robert J. Ward, *District Judge, sitting by designation.*

NOS. 81-1476; 81-1480; 81-1482

UNITED STATES OF AMERICA,

Appellee,

v.

GABRIEL OUTMEZGIUNE, RAFAEL SAADON, and RAFAEL BEN-NATAN,

Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

1. Appellants Rafael Saadon and Gabriel Outmezgiune claim that Judge Bramwell erred in refusing to give the entrapment charge requested. In this Circuit, if the defendant adduces some evidence of inducement by the Government, the prosecution then has the burden of establishing the defendant's propensity to commit the crime. *United States v. Valencia,* 645 F.2d 1158, 1166 (2d Cir. 1980); *United States v. Sherman,* 200 F.2d 880, 882-83 (2d Cir. 1952). Assuming that Saadon and Outmezgiune met their burden, the entrapment charge was not necessary "if 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.'" *United States v. Riley,* 363 F.2d 955, 959 (2d Cir. 1966). The propensity of Saadon and Outmezgiune to commit the crimes was established overwhelmingly. They instantly accepted the suggestion that they purchase the heroin from France. They were able to deliver heroin to the Drug Enforcement Administration (DEA) informant Marcel Atties on the very day he asked for it. They possessed large amounts of cash which indicated that they were substantial and frequent drug traffickers. Saadon and Outmezgiune adduced nothing to contradict this evidence of propensity. Accordingly, under the circumstances, it was not erroneous for the trial judge to refuse to charge the jury on entrapment. *United States v. Licursi,* 525 F.2d 1164, 1168-69 (2d Cir. 1975).

Appellant Saadon contends that Judge Bramwell improperly refused to charge the jury that "the fact that a person may have been in a state of drug-induced stupor at the time of the commission of a crime may negative the existence of specific intent." There was simply no evidence, however, indicating that Saadon's drug addition led him to be so consistently under the influence of drugs that he was unable to form the mental intent necessary to commit the crimes charged. *See United States v. Busic,* 592 F.2d 13, 21 (2d Cir. 1978).

3. Appellant Saadon also argues that the Government's conduct in this case was so shocking as to violate the Due

Process Clause of the Fifth Amendment in that the Government agents supplied Saadon with 2 grams of heroin which was from 89%-91% pure knowing that he was a heroin addict likely to ingest it thus risking Saadon's life. This claim is without merit. Supplying heroin samples during a narcotics investigation can hardly be labelled "egregious". *Cf. United States v. Alexandro,* No. 81-1435, slip op. at 1718 (2d Cir. Mar. 18, 1982). The purity of the heroin was essential since it was supposed to be a sample of the uncut heroin coming in from France.

4. There was ample evidence to support the conviction of appellant Rafael Ben-Natan. The standard on review is whether " 'upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' " *United States v. Rivera,* 513 F.2d 519, 529 (2d Cir.), *cert. denied,* 423 U.S. 948 (1975). Ben-Natan was frequently sighted by DEA agents in or near Saadon's car while Saadon was meeting with Atties and discussing the importation of heroin from France. He participated in a meeting on May 13, 1981 with Sasadon, Atties and Outmezgiune and warned them to be careful of possible surveillance. In addition, one of the safety deposit boxes containing the money to be used for the purchase which was shown by Sadon to Atties belonged to Ben-Natan and he held a power of attorney over another box. The evidence sufficiently demonstrated that Ben-Natan was a knowing participant of the conspiracy.

5. Appellants' other claims are equally without merit.

6. Accordingly, the judgments are affirmed.

S/IRVING R. KAUFMAN

s/RALPH K. WINTER,
Circuit Judges

ROBERT J. WARD, *District Judge*

APPENDIX B — INDICTMENT

CR 81-00321
UNITED STATES OF AMERICA

-against-

RAFAEL SAADON, GABRIEL OUTMEZGIUNE, and RAFAEL BEN-NATAN,

Defendants.

BRAMWELL J.

THE GRAND JURY CHARGES:

COUNT ONE

From February 1, 1981 through May 13, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants RAFAEL SAADON, GABRIEL OUTMEZGIUNE and RAFAEL BEN-NATAN, together with others known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Title 21, United States Code, Section 841(a)(1).

1. It was part of said conspiracy that the defendants and others known and unknown to the grand jury would import into the United States from places outside thereof substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

2. It was further part of said conspiracy that the defendants and others known and unknown to the grand

jury would possess with intent to distribute and distribute substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and others known and unknown to the grand jury would possess substantial amounts of United States currency for the purpose of purchasing large quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 9th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1)).

COUNT THREE

On or about the 12th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately one hundred (100) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1)).

COUNT FOUR

On or about the 19th day of February, 1981, within the Eastern District of New York, the defendant RAFAEL SAADON, together with others known and unknown to the grand jury, did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL

[Signed by foreman]

[Signed] Edward R. Korman
United States Attorney
Eastern District of New York

APPENDIX C — SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 81 CR 321 (S)

UNITED STATES OF AMERICA

-against-

RAFAEL SAADON, GABRIEL OUTMEZGIUNE, RAFAEL BEN-NATAN, JULIETTE LEINWEBER, and SOLOMON ASSERAF,
Defendants.

BRAMWELL J.
8/31/81

THE GRAND JURY CHARGES:

COUNT ONE

From February 1, 1981 through May 13, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants RAFAEL SAADON, GABRIEL OUTMEZGIUNE, RAFAEL BEN-NATAN, JULIETTE LEINWEBER and SOLOMON ASSERAF, together with others known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Title 21, United States Code, Section 841(a)(1).

1. It was part of said conspiracy that the defendants and others known and unknown to the grand jury would

import into the United States from places outside thereof substantial quantities of heroin hydrochloride, a Section I narcotic drug controlled substance.

2. It was further part of said conspiracy that the defendants and others known and unknown to the grand jury would possess with intent to distribute and distribute substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and others known and unknown to the grand jury would possess substantial amounts of United States currency for the purpose of purchasing large quantities of heroin hydrochloride, Section I narcotic drug controlled substance. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 9th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about the 12th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately one hundred (100) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1)).

COUNT FOUR

On or about the 19th day of February, 1981, within the Eastern District of New York, the defendants RAFAEL SAADON, JULIETTE LEINWEBER and SOLOMON ASSERAF, did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

A TRUE BILL

Foreman

EDWARD R. KORMAN,
United States Attorney
Eastern District of New York

APPENDIX D—SEARCH WARRANT-AFFIDAVIT

"Branch No. 105
118-30 Queens Boulevard
Forest Hills, New York

5. One Safety Deposit Box
Described As: Box No.
1031 Rented to JULIETTE
LEINWEBER at Manufacturers
Hanover Trust Co., Branch
No. 105, 118-30 Queens
Boulevard, Forest Hills, New York

Eastern District of New York, ss:

JAMES E. KIBBLE, being duly sworn, says That he is a Special Agent of the Drug Enforcement Administration, duly appointed according to law and acting as such.

Upon information and belief, your deponent has reason to believe that evidence including money, narcotics, gold, diamonds, and records of narcotics transactions representing proceeds of narcotics transactions and things of value to be used in exchange for the purchase of narcotics pertaining to a conspiracy to distribute heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21 United States Code, Sections 846 and 881(a)(6) are contained in Safety Deposit Boxes numbered: 1051 (Rented to Rafael Saadon); 1106 (Rented to Rafael Saadon); 1024 (Rented to Rafael Ben-Natan); 1081 (Rented to Muriel Outmezguine); and 1031 (Rented to Juliette Leinweber) at the Manufacturers Hanover Trust Co., Branch No. 105, 118-30 Queens Boulevard, Forest Hills, New York.

The source of your deponent's information and the ground for his belief are:

1) In February and March 1981, your deponent and Marcel Attias, an informant, made the following heroin purchases:

a) Two ounces for $12,000.00 from Fabriel Outmezgiune and Rafael Saadon in the vicinity of 50th Street and 9th Avenue, New York, N.Y.;

b) Four ounces for $24,000.00 from Gabriel Outmezgiune and Rafael Saadon in the vicinity of 54th Street and Lexington Avenue, New York, New York;

c) Two ounces for $13,000 from Solomon Asseraf, Gabriel Outmezgiune, Sharon Jaffe Outmezgiune and Rafael Saadon in the vicinity of 65th Street and Queens Boulevard, Kew Gardens, New York;

2) In later March and early April 1981, Gabriel Outmezgiune and Rafael Saadon asked the informant, Marcel Attias, to attempt to arrange for them to purchase large quantities of heroin from a source that Attias indicated that he could locate.

3) On May 4 and 5, 1981, Marcel Attias, the informant, had a number of telephone conversations with, at various times, Sharon Jaffe Outmezgiune, wife of Gabriel, Gabriel Outmezgiune and Rafael Saadon. These calls were placed by Attias from Paris, France to DEA in New York and thereupon transferred to Gabriel Outmezgiune's New York telephone number in order that they could be monitored by your deponent and other DEA agents. During these conversations, the arrangements for Attias' impending trip to New York with his French heroin source were discussed.

4) On May 7, 1981, Marcel Attias arrived in New York, contacted Rafael Saadon and agreed to meet with him on the following day, May 8, 1981.

5) On May 8, 1981, Marcel Attias furnished a 2 grain sample of heroin provided to him by DEA, to Rafael Saadon and Gabriel Outmezgiune at the Taft Hotel, New York, N.Y.

6) On May 9, May 11 and May 12, 1981, Miguel Attias on one occasion accompanied by Special Agent Bill Ward of the DEA, posing as his French source, continued to negotiate with Rafael Saadon and Gabriel Outmezgiune for Attias and Ward to sell to them seven kilos of heroin for $455,000.

7) On May 13, 1981, Marcel Attias accompanied by Rafael Saadon went to Branch 105, Manufacturers Hanover Trust Co., 118-30 Queens Boulevard, Forest Hills, New York, where Saadon showed Attias the contents of safety deposit boxes 1051 (Rented to Rafael Saadon); 1106 (Rented to Rafael Saadon); and 1024 (Rented to Rafael Ben-Natan). During this time Gabriel Outmezgiune and an individual tentatively identified as Rafael Ben-Natan waited outside the bank. In the three above-described safety deposit boxes, Marcel Attias observed $455,000 in United States currency which he counted. Saadon informed Attias that this was the money intended to be used as payment for the aforementioned seven kilograms of heroin. Attias also observed a large quantity of diamonds and a large quantity of gold.

8) Investigation by other agents of the Drug Enforcement Administration revealed that at the same Manufacturers Hanover Branch described above are safety deposit boxes 1081 rented to Nuriel Outmezgiune, brother of Gabriel, and a participant in the negotiations described above in paragraph (3) of this affidavit.

9) Additionally, investigation revealed that at the same bank Box No. 1031 is rented to Juliette Leinweber. Juliette Leinweber fits the description of Sharon Jaffe Outmezgiune. Additionally, bank employees have informed agents of the DEA that Juliet Leinweber has told them that she is married to or living with Gabriel Outmezgiune; She and Gabriel Outmezgiune have been observed by bank employees to often come to the bank together change large amounts of money and visit the safety box area together.

Further, Nuriel Outmezgiune holds a power of attorney for the above-described safety deposit Box 1031 rented by Juliette Leinweber. Finally, reliable informant information has documented Juliette Leinweber as a courier for the Outmezgiune heroin organization.

Wherefore, your deponent respectfully prays that a warrant issue authorizing him and other agents of the DEA to enter safety deposit boxes numbered 1051 (Rented to Rafael Saadon; 1106 (Rented to Rafael Saadon; 1024 (Rented to Rafael Ben-Natan; 1081 (Rented Nuriel Outmezgiune) and 1031 (Rented to Juliette Leinweber) at Branch No. 105, Manufacturers Hanover Trust Co., 118-30 Queens Boulevard, Forest Hills, New York and there to search for and seize, monies, diamonds, gold or other jewelry, narcotics and records of narcotics transactions constituting evidence of a conspiracy to distribute heroin in violation of 21 U.S.C. Section 846 and proceeds of or things of value used in exchange for narcotics transactions in violation of 21 U.S.C. Section 881(a)(6)."